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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DISCUSS 10/24/01
DRAFT 11/14/01
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U.S. PATENT & TRADEMARK OFFICE

01-1640
(Serial No. 08/567,564)

IN RE JOHN KOLLAR

Appeal from the United States Patent and Trademark Office, Board of Patent Appeals and Interferences

# PRINCIPAL BRIEF
for
Appellant
John Kollar

John Kollar Pro Se
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201 652-8770

**BRIEF**

Background Appellant's Actions

Appellant filed a patent application on December 5, 1995, along with a notice of intent to file a Request for Interference (RFI) with US Pat. No. 5,371,298.

Appellant filed an RFI, *CL2*, on March 24, 1996 at the USPTO, with US Pat. No. 5,371,298, to ARCO Chemical Technology L.P. a unit of ARCO Chemical Company (ACC).

Appellant had given a full technical disclosure of the "interference" material to ACC as a part of a complex, 13 section chemical process, prior to the commencement of any ACC experimental effort on '298. RFI documentation, specifically, a dated ACC Confidence Agreement ***A178-A181***, contained said information, its acknowledgement and ACC signature.

Appellant sought resolution with ACC via a series of letters, conversations and meetings (which are not a part of the RFI documentation in the USPTO file).

Appellant sent the entire RFI to ACC in order to facilitate a remedy. With RFI in hand, ACC through outside counsel, filed a Petition with the USPTO.

ACC's Petition (apparently not under oath) made false statements claiming a §102(b) sale, based on (1) an ACC paid $ 20,000 disclosure fee and (2) inferring that a Celanese Definite Agreement (AGREEMENT), an R&D cooperation was also a §102 b sale. The ACC disclosure fee was clearly defined in the ACC Confidence Agreement. ***A179 (4)***

Background USPTO's Actions

Examiner rejected Appellants RFI under the §102(b) on-sale bar. Examiner cites two sales, (1) the ACC Confidence Agreement and (2) the AGREEMENT, as rejection grounds.

CL - Certified List
A - Appendix

The Board of Patent Appeals and Interferences (BPAI) rejects both of the Examiner's indefensible "on-sale bar rationale". ***A002-A003***

If Examiner's position cannot be defended, then it should never have been instituted and an interference should have been declared. For equitable treatment under the law, should all patent applications be given a second review by the BPAI?

BPAI instituted "rationale materially differs(ent)" which they applied to the Celanese AGREEMENT for a new grounds for a §102(b) on-sale bar. ***A041-A043***}

BPAI, alone must explain and defend their "rationale" to the Court, and of "Board created" facts and errors upon which fiction the Board applies the law.

Board's "rationale" if allowed to prevail will destroy nearly all independent, small business, university, government and even large corporate "inventions" which requires a cooperative effort to establish innovation. Such cooperations are now common even with major entities.

Board "rationale" if allowed to prevail will gut a major segment of the US Constitution, Art. I Sect. 8, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries;"

USPTO/BPAI's protracted delays and lack of required impartiality has irreparably harmed Appellant and the Progress of Science.

## ISSUES

**Is the AGREEMENT experimental? Is the AGREEMENT a sale?**

If the AGREEMENT is experimental, the on-sale bar does not apply!

If the AGREEMENT is not a sale, the on-sale bar does not apply!

Facile Resolution with Minimal Effort for the Court

For the benefit of the Court, if it so desires, Appellant suggests that the most expeditious and unbiased path to the facts of a §102(b) on-sale bar is a direct reading and self interpretation of the unredacted AGREEMENT, ***A335-A357,*** by the Court.

The intent and purpose of the AGREEMENT are logically organized and clearly stated in plain legal language.

Appellant would proffer to the Court that an instant unbiased assessment of the issue/s becomes evident from a easy reading of the following wide margined, well spaced 11 pages of the AGREEMENT compared to plodding through the BPAI's error ridden, obfuscating, word-packed 90 pages composite of BPAI Papers in *CL-24, CL-26 and CL-28.*

Suggested reading,

SECTION 2, defines the cooperation, R&D timing, responsibilities and obligations of the AGREEMENT. ***A339-A343***

SECTION 5, defines licensing terms that are earned by Celanese upon successful commercialization. ***A 350-A353***

SECTION 3, define termination rights at various stages of the anticipated 5 to 7 years of the R&D Phase which details the rights earned by Celanese proportionate to Celanese effort. ***A343-A346***

Appellant's Appraisal of BPAI's Non- Experimental Position of AGREEMENT

This BPAI panel is totally inexperienced in commodity chemicals innovation, the topic of the AGREEMENT as their collective CV's establish. ***A365***

Appellant provided BPAI a primer on commodity chemicals innovation. ***A255-A261***

BPAI fails to comprehend, acknowledge or respond to the facts of this commodity chemical case which coincidently is diametrically opposed to this BPAI panel's lifetime of patent examination. This BPAI panel has examined a mere 7 patents in the field of commodity chemicals out of a total 3,606 patent examinations ***A376-A378*** mainly in specialty and pharmaceutical chemicals. They may indeed be incapable of assessing what is "experimental" for commodity chemical and for the "experimental exemption".

Compare and note the following drastic differences in all regards between commodity and pharma chemicals. ***A255-A261*** A condensed version follows.

Commodity chemicals are produced at 10 to 20 ¢/lb, sell for 20-30 ¢/lb with over 95% of all R&D efforts dedicated to pre production experimentation where tenths (0.1) and hundredths (0.01) ¢/lb "small" technical improvements are extremely important and patentable. The USPTO database will instantly confirm that scores of patents have issued annually for seven (7) decades, on the topic of the AGREEMENT, which as an industrial chemical entered the patent system about 70 years ago. It is reasonable and understandable that even a mere 0.1 ¢/lb experimental improvement can be immensely important, because it equates to a $ 150 million annual saving from a 15 billion lb/year production base. It is also common sense that failure to achieve the intended purpose of its primary use will destroy a $200 million plant investment. ***A 257, A258*** For a new breakthrough technology, as is the subject of the AGREEMENT, these unknown and undefined details and minutia are infinitely more critical.

Pharma chemicals are generally produced at $1 to $10/lb, sold to the consumer for up to $10,000 to over $200,000/lb. Generally, less than 5% to as low as 1% of pharma R&D is

involved in pre production chemical experimental effort. Over 95% of pharmaceutical research is directed toward confirming medical efficacy.

Pharma in contrast to commodity chemical patents, will rarely have many subsequent patents. Almost none are a decade old. It is reasonable and understandable that where a 10 ¢/lb pharma chemical improvement equates to a mere $ 2–10,000 total production saving in a market earning $ 1-2 Billion, it is not worthy of experimental effort. Even a $ 1/lb saving is trivial. The pharma plant investment cost to produce small volumes is tiny and frequently nil, with common use equipment or subcontracting for its production.

Historically, it is important to verify for this Court the nature and experimental expansiveness of a breakthrough technology. I will address the relevant experimental legal issue from three of Appellants such inventions. ***A301*** Appellant's hydroperoxide, t-butyl hydroperoxide and ethylbenzene hydroperoxide, epoxidation invention in two distinct commercial manifestations of propylene oxide, (PO)/MtBE and PO/Styrene will on completion of 3 now under construction plants produce about 17 billion pounds of useful products annually and eliminate about 10 billion pounds of environmental hazardous salts and chlorinated residues which would otherwise be produced by the old chlorohydrin process. Such large numbers are without a good reference, but visually the 17 billion pounds of useful products equates to a volume of about 35 times the now too familiar volume of debris from the World Trade Center Disaster. That volume of commodity is produced yearly from one Technology.

In its conceptual stage, the epoxidation technology had at least a dozen hydroperoxide candidates, about 2 dozen viable transition and other metal catalysts each in a variety of chemical compositions and many potential reactants classes with several commercially important olefins which could yield commercially important epoxides. Technology does not

stand isolated from the realities of the world. There are a great amount of interactions of commercial realities which contribute to the experimental priorities. Hundreds of man-years of effort were required to achieve the first PO innovation. Indeed, hundreds of additional man-years were dedicated to additional experimental effort in this breakthrough technology by a plethora of graduate students, academics and industrial researchers. USPTO database.

This breakthrough epoxidation technology that I discovered in 1961 is the direct genesis of work of the most recent Nobel Laureate K. Barry Sharpless. Professor Sharpless started his "asymmetric epoxidation" (Nobel Citation) with t-butylhydroperoxide at MIT about 15 years later. Many of the Professor Sharpless' specifics are public record, since he is heavily published as an academic wherein "publish or perish" is the life theme. In industry it's "publish and perish under the weight of law suits". (Humor) Derivative work of my invention, 15 years later for a further duration of the next 15 years by MIT Professor Sharpless and his cadre of graduate students involving by my estimate about 1-200 man-years (school years) of experimental effort on an "improvement", must certainly be obviously "experimental". Q.E.D.

So what must it be at an embryonic stage, as in the AGREEMENT?

Appellant cites the above three paragraphs, for which I admit that I am indeed unabashedly proud, to demonstrate to the Court the absolute naiveté of the BPAI panel's "rationale" in suggesting that the AGREEMENT was not experimental. The subject matter of the AGREEMENT has commercial potential to exceed my epoxidation invention.

Appellant will reiterate the readily comprehendible points, the breakthrough invention of the cooperative AGREEMENT has multiple, 13, sections of processing and recovery to achieve a product for its intended purpose, the chemistry in each section has hundreds of unknowns,

hundreds of engineering improvements, recycle studies, alternate processing studies, economic studies and optimizations of everything possible. The vast bulk of these activities are experimental with the incidental purpose of ultimate commercialization, the objective in the US Constitution, Art. I Sect. 8, "To promote the Progress of Science....."

Do note that pioneer work in any field has an extraordinary amount of "overburden" to clear to establish an innovation. Those that follow have the pathways at least partially cleared for further pursuits and advances. The "overburden", supporting sections, of a key invention in a process is of equal criticality to meet the intended purpose. Everything must work to satisfy the intended use or you have nothing. Later efforts do not have this impediment and accordingly can concentrate their efforts on selective objectives. Academia does not need to burden themselves with real utility and thereby eliminate from 75 to 90% of the otherwise mandatory experimental support efforts. The point remade here is that commodity chemical inventions recur in substantial numbers on a yearly basis unlike the inventions this BPAI panel is familiar with.

Chemical history proves that first commercial plants do not establish the completion of innovation until all technical risk has been eliminated and the facility can produce a product to meet its intended use. A commercial plant when it fails to meet its intended use, becomes a hugely expensive experimental vehicle or a scrap heap. The quiet side of chemical history is that a 99.9% success rate is a 100% real failure. ***A257, A258*** Appellant's third cited major breakthrough invention for the direct, highly selective acetoxylation of ethylene to produce Ethylene Glycol was such a $ 330 million failure in Channelview, Texas in about 1979-80. About $ 150-170 million of the total represents about a years worth of experimenting on the 800 million pound per year commercial plant to get it to meet its intended use. BPAI

hypothesis of Celanese avoiding the experimental requirements of the AGREEMENT are beyond naiveté. ***A041-A043, A066-A068*** More appalling is this BPAI panel's resistance to knowledge.

This particular BPAI panel, Appellant suggests, may not be capable of truly understanding the nature of "commodity chemical" experimentation and indeed may be unintentionally biased from their opposite life long work experience. These facts make some of the BPAI's initial assessments in *CL-24* understandable in the extreme, albeit they are not factually or legally correct.

Proof of this panel's deficiency ***A376-A378*** , made it imperative to inform and educate this BPAI panel in commodity chemical innovation. Appellant attempted to do this in plain language and on as broad an information scale as possible. ***A255-A261***

BPAI simply ignores a multitude of relevant facts embedded in the AGREEMENT.

BPAI attempts to preempt the legitimate experimental exclusion to a §102(b) bar.

BPAI simply ignores the total experimental content of the highly detailed and specific research and development AGREEMENT ***A339-A343***, including compelling documentary evidence such as the 4 US Patents derived from experimentation under the AGREEMENT and simply dismisses them. ***A146, A290, A059*** (Note 7) Pregnant or not pregnant, there is no middle ground. You need not be Solomon to comprehend the status of the fetus and mother. The US Patents ex the AGREEMENT are experimental or they are not. If the US Patents are experimental the AGREEMENT is experimental. You need not be Solomon to separate them. So what are these 4 US Patents? Another Immaculate Conception?

BPAI arbitrarily dismisses ***A061, A062*** documentary experimental improvement evidence ***A174, A175*** in the RFI. This same documentation is a manifestation of the experimental

nature and mutual cooperative obligation of the AGREEMENT 2.6 to make (experimental) progress reports, meet, exchange information etc. ***A341*** Further, the date purpose and headings of this agenda document, "January 21, 1983 Meeting", "Major Areas of Research" and "Major Conclusions" clearly indicate not only its experimental nature, but together with the AGREEMENT, indicate this to be one of a greater number. Factually, such meetings were a quarterly event. This was the only meeting that had any evidence pertinent to the RFI. Process improvements, as exemplified by the crude experimental data in ***A175,*** are USPTO recognized patentable material, which are extremely common in commodity albeit rare in pharma invention. ***A175*** is far from being complete or answering its intended use.

BPAI simply ignores Celanese's Experimental Obligations of the AGREEMENT. ***A250***

BPAI simply ignores Appellant's Experimental Obligations of the AGREEMENT. ***A251***

BPAI does not use the USPTO's multiple guidelines of MPEP 2133.03(e)(4) to exclude the "experimental use" exemption. BPAI has not cited any exclusions, and indeed cannot because not a single item from this MPEP list would support an exclusion. ***A371 –A372***

BPAI ignores that the AGREEMENT is a legal cooperation. A cooperation and a sale are as opposite as their respective motivations of mutuality and self-centeredness. ***A361-A363***

BPAI ignores the fact that the AGREEMENT in Sections 5 and 3 is a licensing arrangement based on "EARNED" innovation inputs. ***A350-A353 A343-A346***

BPAI transforms Celanese experimental R&D obligations into payments ***A042, A251*** for an impossible hypothetical "sale"! ***A249***

BPAI does not use the USPTO's multiple guidelines of MPEP 2133.03(e)(1) to indicate commercial exploitation in support of a "sale or offer of a sale". BPAI has not cited, and indeed cannot because none exist, not a single item from this MPEP list. ***A363***

BPAI then creates an impossible hypothetical, which would be implicitly fraudulent, into a §102(b) bar. ***A249***

BPAI then has the temerity to suggest that the preponderance of evidence is supportive of their §102(b) bar decision after preamble with an error. ***A084***

Pertinent "§102(b) on-sale bar" Law

In Supreme Court Justice Stevens' opinion of a unanimous decision in *Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 67,* states the following,

"We conclude, therefore, that the on-sale bar applies when two conditions are satisfied before the critical date. "First, the product must be the subject of a commercial offer for sale. An inventor can both understand and control the timing of the first commercial marketing of his invention. The experimental use doctrine, for example has not generated concerns about indefiniteness, and we perceive no reason why unmanageable uncertainty should attend a rule that measures the application of the on-sale bar of 102(b) against the date when an invention that is ready for patenting is first marketed commercially. .... .... .... ..."

"Second, the invention must be ready for patenting. That condition must be satisfied in at least two ways: by proof of reduction to practice before the critical date; or by proof that prior to the critical date the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention. ... ... "

As regards the "invention" which must be ready for patenting, Justice Stevens states the following.

"The word "invention" must refer to a concept that is complete, rather than merely one that is "substantially complete.""

Justice Stevens words from his opinion.

"Nonetheless, an inventor who seeks to perfect his discovery may conduct extensive testing without losing his right to obtain a patent for his invention even if such testing occurs in the public eye. The law has long recognized the distinction between inventions put to experimental use and products sold commercially. In 1878, we explained why patentability may turn on an inventor's use of his product."

".... .... .... .... .... .... .... ... when the delay is occasioned by a *bona fide* effort to bring his invention to perfection, or to ascertain whether it will answer the purpose intended. His monopoly only continues for the allotted period, in any event; and it is the interest of the public, as well as himself, that the invention should be perfect and properly tested, before a patent is granted for it."

From the above verbatim wisdom of Justice Stevens it is evident that there are at least three exemptions to the §102(b) on-sale bar, including

1. "product must be the subject of a commercial offer for sale"
2. "experimental use doctrine"
3. "invention must be ready for patenting"
    a. " "invention" must refer to a concept that is complete"
    b. "patentability may turn on an inventor's use of his product"
    c. "a *bona fide* effort to bring his invention to perfection, or to ascertain whether it will answer the purpose intended."
    d. "it is the interest of the public, as well as himself, that the invention should be perfect and properly tested."

BPAI ignores the Supreme Court enunciated law and the MPEP guidelines involving the issues of a "sale", "experimental use", "invention" and many specific concept requirements of being "complete", or "bona fide efforts to perfect" or "to ascertain whether the process would answer the purpose intended", to yield a commercially acceptable product.

The AGREEMENT demonstrates that there is neither a product nor a sale. The experimental nature of the R&D AGREEMENT would exempt it from a §102(b) bar. The invention was not ready for patenting because it was not complete and could not answer whether it would meet the extreme quality specifications for its intended purpose, "fiber grade EG" which coincidentally has been its only growth area for the past two decades. ***A336*** E.

BPAI ERRORS

There are just too many BPAI errors, posturings and obfuscations to deal with in the allotted space. Accordingly, Appellant will address only the first substantive one occurring in each of BPAI authored Papers because these are in fact the first impressions of BPAI opinions which a reviewing entity such as the Court will encounter. BPAI's writing style will discourage all but the bravest from venturing in depth on the issues. Attorneys are educated in the business of words and accordingly an impartial Board should be able to express themselves very clearly, not so this BPAI panel.

BPAI creates a choice for Celanese to do no experimental work and avoid a contractual Celanese obligation. BPAI's compounding error is taken verbatim from ***A041.***
"It is clear from the signed Celanese Definitive AGREEMENT that while there was an "R&D Phase" in which Celanese, with the participation of Redox, was to experiment with the "commercialization" of the "Technology" if Celanese deemed it necessary, ... ... ... ."

Compare BPAI statement above to the legal contractual obligations following.

2.1 Celanese, with the cooperation of Redox, shall conduct such research and development (R&D) in the Field, and shall pilot such step or steps as Celanese deems advisable, with a goal of achieving, by the end of 5 R&D Years, Celanese approval for a commercial plant in the Field.

Appellant asks where in the AGREEMENT is this BPAI stated [experiment with the "commercialization"] and where is [if Celanese deemed it necessary]? ***A335-A357***

The BPAI hypothesized circumstances would constitute an extreme of ill will and even fraud by Celanese, which clearly and absolutely went against the grain, spirit and reality of the entire contents of the cooperative AGREEMENT, before and after signing.

BPAI's second paper ***A057, A058***, attempts to portray "BPAI's "white hat" impartiality" by suggesting that they are bending over backwards to give extra consideration to Appellant Request for Rehearing, *CL 25*, over and above all legal requirements. Factually, virtually the entirety of Appellant's , *CL 25*, Request was in fact "demanded" by BPAI in ***A048-A051***. BPAI's inquisitorial 4 pages of extensive and complex questions asked for numerous all inclusive "fishing inquisition" queries and details of a myriad variety.

In fact the vast bulk of Appellant's *CL 25* is directed toward answering this BPAI inquisition. Each of the Appellants "exhibits" and indeed the "last 26 pages" were "BPAI mandated" responses to BPAI questions. These 26 pages are in fact very abbreviated, because Appellant took the common features of the BPAI questions and prepared focused sets of common responses on ***A247*** to avoid multiple cross references, repetitions and obfuscation.

BPAI on ***A089*** again "clearly misquotes" and certainly attempts to convey a message that Appellant agree with BPAI's legal position, which Appellant never did. Examine BPAI verbatim words and compare them to Appellants actual statements.

BPAI states, " In his present Request, Appellant contends that we have misapprehended only the facts with respect to the "key areas" of ""Sale", "Experiment" and "Ready for Patenting"" and "not issues of law." This is 100% pure poppycock. Appellant has said that BPAI misunderstood the facts and misapplies the law. See mid ***A381***. Faulty BPAI facts can never be justly rectified by any application or misapplication of the law.

Appellant has clearly and consistently stated that BPAI has misinterpreted both the facts and the applicable law of the case. Appellant's Request *CL 25* deals primarily with the facts of commodity chemical innovation and the contents of Appellant's *CL 27* is directed towards BPAI legal deficiencies in "key areas" of "Sale", "Experiment" and "Ready for Patenting".

BPAI has a strange tendency to explain that something negative has not been shown (proven). As participants associated with science, it is a given that a negative cannot be proven or disproved. But BPAI goes much further at ***A091*** regarding negatives of "intended purpose". BPAI despite the Commodity Chemical Primer, ***A374*** and stated purpose in the AGREEMENT ***A336*** E., closes their eyes and choose not see the intended purpose.

BPAI which cannot see or understand that which is before their eyes, however seem to have exception vision into Celanese's intentions. BPAI can divine Celanese intentions to merely "fine tune" the Technology. Oh, Yeah! Five to seven years of R&D, millions of dollars for the R&D with a hundred or more Celanese people with about 40 -50 professionals, ***A166*** and several more year to build a $ 150-200 Million dollar plant is some heck of a lot of fine tuning. ***A091***

Lastly, I cite ***A379-A382*** as another common recurring BPAI error laden obfuscation technique. Besides errors of fact, BPAI inserts a series of back references to create an "aura

of support" for these errors, when they understand that multiple cross referencing is a certain method to discourage a complete examination.

This USPTO/BPAI mismanaged actions has already damaged, perhaps irrevocably, a very serious, over year long, British Petroleum interest, which waned because of the uncertainty created and delays in this matter.

Honorable Judges of the US Court of Appeals for the Federal Circuit:

Appellant respectfully submits this Brief to the United States Court of Appeals for the Federal Circuit for its informed, fair and impartial consideration. Appellant request that the Court find for the Appellant and direct the BPAI to instantly declare an interference with ACC and declare Appellant as senior party on the prima facie showings that Appellant had disclosed to ACC and of being the first to invent as required by 37 CFR § 1.608.

Respectfully submitted,

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